



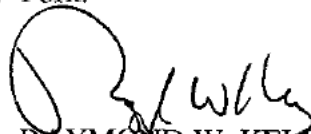
POLICE DEPARTMENT

CHAN

-----X  
In the Matter of the Disciplinary Proceedings :  
- against - : FINAL  
Sergeant Albert Jackson : ORDER  
Tax Registry No. 891658 : OF  
Transit Bureau Citywide Vandals Task Force : DISMISSAL  
-----X

Sergeant Albert Jackson, Tax Registry No. 891658, Shield No. 4492, [REDACTED]  
[REDACTED] having been served with written notice, has been tried on  
written Charges and Specifications numbered 82251/06, as set forth on form P.D. 468-  
121, dated September 11, 2006, and after a review of the entire record, has been found  
Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the  
Administrative Code of the City of New York, I hereby DISMISS Sergeant Albert  
Jackson from the Police Service of the City of New York.

  
RAYMOND W. KELLY  
POLICE COMMISSIONER

EFFECTIVE: September 24, 2008



POLICE DEPARTMENT

August 14, 2008

-----X  
In the Matter of the Charges and Specifications : Case No. 82251/06  
- against - :  
Sergeant Albert Jackson :  
Tax Registry No. 891658 :  
Transit Bureau Citywide Vandals Task Force :  
-----X

At: Police Headquarters  
One Police Plaza  
New York, New York 10038

Before: Honorable Claudia Daniels-DePeyster  
Assistant Deputy Commissioner – Trials

APPEARANCE:

For the Department: Lisa Bland, Esq.  
Department Advocate's Office  
One Police Plaza  
New York, New York 10038

For the Respondent: Andrew Quinn, Esq.  
Quinn & Mellea, L.L.P.  
339 Knollwood Road – Suite 220  
White Plains, New York 10603

To:

HONORABLE RAYMOND W. KELLY  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on April 9 and May 16, 2008, charged with the following:

1. Said Sergeant Albert Jackson, assigned to Transit Bureau Citywide Vandals Task Force, on or about and between May 21, 2006 through August 21, 2006, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said sergeant did wrongfully ingest cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Sergeant Albert Jackson, assigned to Transit Bureau Citywide Vandals Task Force, on or about and between May 21, 2006 through August 21, 2006, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department in that said sergeant did wrongfully possess cocaine without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

The Department was represented by Lisa Bland, Esq., Department Advocate's Office, and the Respondent was represented by Andrew Quinn, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

### DECISION

The Respondent is found Guilty as charged.

### Introduction

It is not in dispute that on May 21, 2006 the Respondent was notified to report to the Police Department Medical Division for a random Dole test. It is also not in dispute that he submitted to the Dole test where three hair samples were collected from his chest

because he had insufficient head hair at the time of the collection. Nor is it in dispute that following the hair collection, the Respondent was notified that two of his three hair samples that were sent for testing by the Department came back positive for cocaine. What *is* in dispute is whether the Respondent wrongfully ingested and possessed cocaine (Specification Nos. 1 and 2). To prove the charges, the Department called witnesses including Dr. Thomas Cairns as an expert witness. The Respondent testified in his own behalf.

Prior to the commencement of this trial, the Respondent filed a Motion to Dismiss this cause of action. The Decision in the Motion to Preclude Evidence is attached as Schedule A. At the commencement of the trial, the Respondent renewed its application to dismiss this cause of action. The decision on that application will be addressed in the Findings and Analysis portion of this decision.

### SUMMARY OF EVIDENCE PRESENTED

#### The Department's Case

The Department called Police Officer Manuela Davis and Doctor Thomas Cairns as witnesses.

#### Police Officer Manuela Davis

Davis, an 18-year member of the Department, is currently assigned to the Medical Division. For the last year-and-a-half, she has been assigned to the Drug Screening Unit, where she is responsible for collecting hair and urine samples for drug testing. She has read a training manual and watched a training video on how to collect samples. In

addition, she was at first paired to work with a more experienced sample collector. Davis is also a certified Emergency Medical Technician. She typically collects eight to ten samples a day and forty to fifty a week.

Davis testified that on August 21, 2006, the Respondent reported to her unit for a random drug test. After signing in, the Respondent prepared a Drug Screening Questionnaire [Department's Exhibit (DX) 1]. The Respondent was assigned drug screening number 18-2590-06-XH. Davis explained that this number is unique to the Respondent. She further explained that the "18" meant the Respondent was the 18<sup>th</sup> person tested that day; that the "2590" meant he was the 2,590 person tested for the year; that the "X" meant the test was random and the "H" meant hair testing. On the questionnaire, the Respondent did not indicate that he had taken any prescription medication within the past three months.

Davis stated that three hair samples were taken from the Respondent. Two of the samples were sent to the Psychomedics Corporation (Psychomedics) for testing, and the third was kept at the Medical Division. The Respondent prepared two Custody and Control Forms, one for each sample sent to Psychomedics. [DX 2 and 3 are copies of the Custody and Control Forms. They contain the Respondent's drug screening number in the space for donor identification. DX 2 is marked with serial number J221878, and DX 3 is marked with serial number H983931.]

Davis testified that before collecting the samples, she cleaned the table with alcohol to prevent any cross-contamination. She then placed white butcher block paper on the table and collected the hair samples from the Respondent's chest. She shaved the Respondent's chest with a disposable razor that had never been used before. She shaved

in a downward motion from both sides of the Respondent's chest, collecting the hair on a piece of cardboard and then placing it on the butcher block paper until she had enough hair for all three samples. Davis then enclosed each sample in a foil strip and placed each strip in a Sample Acquisition Card envelope. Each envelope was closed with an integrity seal. [DX 4 and 5 are copies of the Sample Acquisition Cards. They contain the Respondent's drug screening number and the serial numbers found on the Respondent's Custody Control Forms. The Respondent initialed both cards.]

Throughout the entire collection process, Davis wore gloves and the Respondent stood at her side. At no point did the Respondent ask any questions or make any complaints. Two of the Respondent's samples were secured in a hair locker until they were sent to Psychomedics. Only Davis' supervisor had access to the locker. The Respondent's third sample, the one that stayed behind at the Medical Division, remained under the supervision of the Sick Desk supervisor. According to Davis, the hair collection process was not different in the Respondent's case than in any other case. She stated that she, nevertheless, had an independent recollection of collecting from the Respondent because she shaved his chest and he had to take his shirt off.

On cross-examination, Davis testified that the Department sends samples to Psychomedics via overnight mail. She stated that the Custody and Control Forms for the Respondent's samples indicate that the laboratory received one of the samples on August 23, 2008 and the other sample on August 28, 2008. She further stated that she is not personally responsible for the mailing of samples, and she could not explain why the samples were received on two different dates. When Davis collected the Respondent's samples, she had been working in the Drug Screening Unit for only two weeks. She

testified that at the time she was no longer working under the guidance of a more experienced sample collector, but she could not recall how long she had been collecting samples on her own. According to Davis, the Respondent did not appear nervous or hesitant to provide samples. The cardboard that she used to collect the samples was an unused Sample Acquisition Card. She explained that she collected hair from the Respondent's chest because body hair must be used when head hair is shorter than an inch and a half.

On redirect examination, Davis testified that it was the Respondent's decision to have his samples come from his chest.

Upon questioning from the Court, Davis stated that she separated the hair on the butcher block paper into three separate samples using her gloved hands. The gloves had never been used before.

#### Doctor Thomas Cairns

Cairns is currently employed as the Senior Scientific Advisor at Psychomedics. Psychomedics is licensed by the federal government and several states, including New York, to practice forensic toxicology. Since 1987, Psychomedics has conducted more than five million hair tests. Based on his qualifications, Cairns was deemed an expert witness in the areas of forensic toxicology and drug hair testing.<sup>1</sup> [DX 6 is a copy of Cairns' curriculum vitae.]

---

<sup>1</sup> Cairns testified that he holds a Bachelor of Science with Honors and a PhD in Analytical Biochemistry. In addition, he has received a post-doctorate degree, a Doctor of Science in Toxicology, from the University of Glasgow. He was previously employed at the Food and Drug Administration (FDA). During his 21-year tenure there, he received a gold medal for outstanding service and was also declared Regulatory Scientist of the Year. In 1988, he became a science advisor to Psychomedics, and in 1995 he joined the company as Vice President for Research and Development. He has written several dozen publications on hair testing and frequently presents his research to scientific organizations. Cairns has personally been

Cairns explained that ingested cocaine enters the bloodstream, which feeds hair follicles. The cocaine and its metabolites (benzoylecgonine (BE), cocaethylene, and norcocaine) thereby get trapped inside the hair as it grows. Since hair grows at a predictable rate, hair acts as a timeline as to when the cocaine was ingested. A sample of chest hair, for example, can represent a period of approximately six months.

Cairns testified that Psychomedics tests hair samples using two technologies, Radioimmunoassay (RIA) and Mass Spectrometry (MS). He explained that when Psychomedics receives hair samples, RIA is conducted on a portion of one of the donor's samples. If the RIA shows that the drug is present at or above a prescribed cutoff level, the sample is deemed to be presumptive positive. In cases where a presumptive positive result occurs, a new portion from the same sample is then washed aggressively to remove external contamination and is tested using MS. Cairns explained that the form of MS that Psychomedics uses is called Liquid Chromatography Mass Spectrometry Mass Spectrometry (LCMSMS), and he described it as "the gold standard for unambiguous identification of drug molecules, such as cocaine and BE." If the MS comes back with a positive result, the laboratory then washes and conducts MS on the donor's second sample. Cairns explained that for a positive test result to be reported to the Department, both of the donor's samples must meet the MS cutoff level, meaning there is found to be a cocaine concentration equal or greater than five nanograms per ten milligrams of hair (5ng/10mg) and a BE concentration equal to or greater than five percent of the cocaine concentration. These cutoff levels are accepted by the federal government, the FDA, various state agencies and the New York City Police Department.

---

involved in hair testing for approximately 40 years, and he holds a license to practice forensic toxicology in New York State.



Cairns stated that on November 27, 2006, he prepared a Laboratory Data Package for the Respondent's hair samples. [DX 7 is a copy of the package.] He explained that the package details the chain of custody with respect to the Respondent's samples and that, according to the package, the chain of custody for the samples was properly intact. Cairns testified that the sample tested by Psychemedics under the Department identification No. 18-2590-06-XH was the Respondent because the same drug screening number used in the packaging of the Respondent's hair sample was initialed by the Respondent. The package indicates that the Respondent's first sample was found to have a cocaine level of 22ng/10mg and a BE level of 1.3ng/10mg (which is above the five-percent BE cutoff level). The package also indicates that the Respondent's second sample was found to have a cocaine level of 23.9ng/10mg and a BE level of 1.5ng/10mg (which is also above the five-percent BE cutoff level). According to Cairns, these test results indicate multiple ingestions of cocaine by the Respondent.

Cairns said that the Respondent's third hair sample was sent to Quest Laboratory Group (Quest) for analysis. This third sample was found to have a cocaine level of 17.7ng/10mg and a BE level greater than five percent. According to Cairns, the Quest result validated the results reached at Psychemedics.

On cross-examination, Cairns testified that the difference in the test results between the Respondent's first and second samples was not significant. He explained that hair is not a homogenous matrix, a chest hair sample contains different lengths of hair, and it is normal to get a deviation of several nanograms on a chest hair sample. Cairns stated that there was more of a difference between the Psychemedics results and the Quest result because the two laboratories use different methods of testing. According

to Cairns, however, the results from both laboratories were consistent since they all showed the presence of cocaine at a level several times the cutoff.

Cairns reiterated that the Respondent's test results indicate multiple ingestions of cocaine. He explained that clinical studies have clearly shown that using a cutoff level of 5ng distinguishes a user population from someone who might be passively exposed with a conservative buffer zone between the two populations. He further explained that a donor who tests at 5ng or above is considered a multiple user, and the more cocaine a person uses the higher the level of cocaine you would expect to find in the hair.

According to Cairns, clinical studies have shown that a person would have to ingest three or four lines of low-grade cocaine over the course of a 90-day period to reach the cutoff level. A user would have to use four to five times that amount to reach the cocaine level found in the Respondent's samples. The higher the potency of the cocaine, the less cocaine would have to be used to reach the same level. Cocaine that is ingested is typically low grade.

Cairns testified that the levels found in the Respondent's samples indicate recreational use of the drug, and a person using that amount of cocaine would not necessarily exhibit outward signs of drug use. Cairns stated that since the Respondent's cocaine level signified multiple ingestions, it was doubtful that the level was reached by involuntary ingestion. In addition, according to Cairns, the Respondent would have received a high from the ingestions.

Cairns stated that in the approximately five million tests that Psychemedics has conducted, there has never been a false positive. He stated that cocaine can get on hair via external contamination, especially self-contamination. The washing procedure that is

conducted before a sample undergoes MS, however, removes this contamination so that only the substance trapped in the hair via ingestion is actually analyzed. Cairns explained that Psychemedics invested great research into its washing procedure so that a false positive based on environmental contamination would never be issued. According to Cairns, a definitive study out of Pinellas County (Florida) showed that undercover narcotics agents who come into daily contact with drugs do not test positive when an aggressive washing procedure is implemented. Cairns testified that the Respondent's hair samples were washed with isopropyl alcohol for fifteen minutes and then underwent five rounds of washing with a wash buffer, which is a slightly acidic water solution. At the end of the three-and-a-half hour washing process, the fifth wash is retained and analyzed. The fifth wash in the Respondent's case contained a cocaine concentration of .6. According to Cairns, this level of .6 in the last wash is consistent with a chest hair donor whose MS results are 22 or 23ng/10mg.

Cairns said that the external contamination of the Respondent's chest hair possibly came from the Respondent ingesting cocaine and it coming out in his sweat. He explained that as the cocaine enters the bloodstream, it feeds the hair follicles. The blood system also feeds the sweat glands that exit the surface of the head, one's pores and the sweat on the head. He further explained that since the Respondent's sample was chest hair, it is unlikely that external contamination came through his clothing. He opined that the cocaine from his system sweated onto the chest hair contaminating it, but he could not confirm this theory.

Cairns testified that both of the Respondent's samples arrived at Psychemedics on August 23, 2006. While the first sample underwent analysis, the second sample remained

in temporary storage under chain of custody. Because the first sample tested positive, the second sample was removed from storage for its own analysis. This occurred on August 28, 2006. Cairns stated that of the more than 3,000 samples that Psychomedics receives in any given day, several are returned because there is a problem with the chain of custody.

Cairns testified that although it was once suggested that hair drug testing was racially biased because African American hair holds cocaine longer than Caucasian hair, this theory has been abundantly disproved within the last few years. According to Cairns, there is no bias in the Psychomedics procedure. Cairns stated that this fact was confirmed by a study that the Federal Bureau of Investigation conducted just last year using 40,000 samples. It was also confirmed by a Canadian study in which a Professor Koren contaminated hair with 8,000 lines of crack cocaine smoke.

On redirect examination, Cairns testified that hair color is not a factor in drug testing because Psychomedics liquefies all hair samples and then removes the melanin from the samples via centrifuge. He stated that Psychomedics deals with the issue of external contamination by using a washing procedure that is both aggressive and highly conservative. He explained that the procedure is conservative in the sense that Psychomedics uses a mathematical multiplication formula involving the fifth wash residue [i.e., .6 result] to predict what would still be on the hair if it were washed for five additional hours [ $.6 \times 5 = 3$ ]. A sample is deemed positive only if the cutoff level is still reached after this predicted amount is subtracted from the MS result for the sample.

Upon questioning by the Court, Cairns testified that in comparison to a person who smokes or snorts cocaine, a person who eats cocaine has to eat much higher levels of

the drug in order to reach the cutoff level. He explained that the stomach and digestion process destroys about 50 percent. Although a hair sample may still have traces of external contamination after it has undergone the Psychomedics washing procedure, Cairns has never seen external contamination cause a sample to reach the cutoff level after undergoing the five-step washing process. Cairns stated that because alcohol is a solvent, cleaning the collection table with alcohol effectively removes any cocaine adhering to the surface of the table.

#### The Respondent's Case

The Respondent testified in his own behalf and called William Kelly as a witness.

#### Respondent Sergeant Albert Jackson

The Respondent, a 21-year member of the Department, is currently assigned to the Transit Bureau Citywide Vandals Task Force. Prior to the current case, he has neither been the subject of Department charges nor been accused of substance abuse. Over the last five years, he has not reported sick and has received high ratings on his evaluations.

In August 2006, he was notified to appear for a random drug test. He testified that he waited 20 or 25 minutes that day for his driver to arrive at the command and then immediately reported to the Medical Division. He had been called in for a drug test on three or four previous occasions. To his knowledge, all of those tests had negative results. In the August 2006 test, the Respondent gave hair from his chest because the hair on his head was too short. He had no hesitation in providing hair samples. He stated that

he could not recall the details of the collection process, and he described the collection as uneventful.

The Respondent testified that when his Integrity Control Officer and Internal Affairs Bureau personnel informed him that his drug test came back with a positive result, he "almost fell on the floor and had a heart attack." He told them, "I don't drink, I don't smoke, and I don't do drugs." In addition, the Respondent told them that he was working so much overtime that he did not have the time to do drugs. He testified that he has never in his life ingested cocaine or any other narcotic drug. He explained that he grew up in [REDACTED], where he had access to drugs. He chose then to not use drugs, and he separated himself at a young age from friends who were going down the wrong path. He has a brother who uses drugs, but he has not seen his brother in approximately twelve years. The Respondent never liked making drug arrests, and he has not been involved in a drug-related arrest in years. When he was offered a position in the Narcotics Division, he turned it down. He explained that he does not like the drug aspect of police work, and he finds it to be dirty. He does not go to bars, and he does not associate with people who use drugs. The Respondent consistently stated in his Official Department Interviews that he did not use drugs, and he testified that he could not provide an explanation for his drug test results. The day after he was informed of the results, he needed to be hospitalized for high blood pressure.

The Respondent took a polygraph to determine whether or not he is telling the truth. During the polygraph, he consistently stated that he did not ingest cocaine. The Respondent was subsequently informed that he passed the polygraph test. The Respondent testified that had he, in fact, been using cocaine, he would have left the

Department without going to trial upon receiving the drug test results. When he was notified of the test results, he was four months away from his twentieth anniversary with the Department. He had been planning on staying with the Department for at least five more years and had recently interviewed for a position in the Community Affairs Bureau. He reiterated that he has never knowingly or voluntarily ingested cocaine.

On cross-examination, the Respondent testified that the August 2006 drug test was the first time that he gave hair samples. His previous drug tests involved urine samples. The Respondent observed Davis seal the envelopes with his hair inside. The Respondent has not claimed that he may have been exposed to drugs while on duty. After being notified of the positive test results, the Respondent had a urine test conducted by his doctor. According to the Respondent, the urine test came back negative. The Respondent could not recall if he told his attorney about this urine test.

The Respondent testified that he could not recall if the individual who administered the polygraph informed him before the test of what questions were going to be asked. The Respondent stated that he is aware of and agrees with the Department's zero-tolerance policy regarding drugs. He further stated that he does not have any evidence to dispute the positive test results, that all he has is his word.

William Kelly

Kelly is a retired Federal Bureau of Investigations (FBI) agent who worked for the agency for 24 years. Currently he has his own private investigator business where he performs polygraphs out of his residence in [REDACTED]. Kelly testified that he was trained to perform polygraph testing in 1974 by the FBI. He explained that after

Watergate, the FBI decided that it wanted to institute the use of polygraph testing at the Bureau. Kelly was selected from the northeast region to be trained by agents who were familiar with polygraph testing. Overall, between the tests performed while working for the FBI and in his private practice, Kelly estimated that he performed approximately 3,000 polygraph examinations. He stated that the bulk of his duties with the FBI involved working on criminal cases as an FBI agent. He estimated that he conducted a couple of hundred polygraph examinations while employed by the FBI.

Kelly testified that he uses a Lafayette Multi Scribe machine to conduct the polygraph tests. He explained that the machine is enhanced and does not require a high inflation of the arm cuffs to get results. He further explained that the test is designed to read three involuntary nervous systems' reactions that the body cannot control, namely, one's breathing, heart rate and perspiration. He stated that when someone tells a lie, his or her body knows the truth and it creates stress in the body. Kelly said he uses the polygraph tests for a variety of situations, such as when a theft occurs in a company, or upon a request by an attorney for a client.

Kelly stated that he has been a member of the National Polygraph Association for the past nine or ten years. He attends annual training to keep apprised of current polygraph developments. He said that he has been receiving points toward his certification, but the process has not been completed and no one has received certification yet. Kelly said there were one or two classes that he did not attend because the courses did not relate to his practice, so he may be one or two points behind where he needs to be to receive his certification. Kelly was tendered as an expert in the field of polygraph examinations.



Kelly said that he never was asked to testify before a state or federal court, but he did appear as an expert in other administrative proceedings. He said that he was contacted by the Respondent's attorney and it was arranged for him to perform the polygraph test of the Respondent at his [Kelly's] residence. Kelly stated that a union delegate accompanied the Respondent to his residence, but he was not present during the actual test. Kelly was advised that the Respondent had "flunked" a hair test for cocaine so he decided to test him to see if he had used cocaine. To prepare for the test, Kelly testified that he interviewed the Respondent. He told him the questions he was going to ask him and then asked his permission to ask certain questions. He asked the Respondent if he could ask him, "Have you ever used cocaine while you were a police officer?" He also asked, "Have you ever used any illegal drugs while you were a police officer?" Kelly stated that he could not recall how long he spoke with the Respondent before administering the polygraph test.

Following the interview of the Respondent, Kelly testified that he commenced the examination with a couple of irrelevant questions to get the Respondent to relax. A question such as whether he was born in 1954. He then asks the Respondent a "known lie question" followed by a relevant question. This is why the test is known as a relevant/irrelevant test. Kelly explained that this type of test was the format of the first polygraph test that was administered and it is still used by some polygraph testers today. In this test, Kelly asked the Respondent first, was his name Albert; he then asked him if he lives in the Bronx and then he asked him had he ever stolen anything worth more than \$10.00. Kelly explained that the third question about stealing and \$10.00, 99 percent of

the population says no to the question and that answer is a lie. He said that answer becomes the control question and the result is used to measure the rest of the test.

To measure the Respondent's breathing, heartbeat and perspiration, Kelly used various devices. He testified that he used a black tube that went around the Respondent's stomach area which was filled with air. As the Respondent breathed, a needle went up and down to measure different breathing patterns. The Respondent had an arm cuff which measured his heartbeat as well as his blood pressure as it went up and down. Two electrodes were also placed on the fingers to measure excess static electricity which was given off from the body. According to Kelly, the more one perspires, the faster the electricity will move.

Kelly stated that he asked the seven questions. Following the first test, he immediately wrote the name of the subject and the date on the polygraph chart (RX B). He then asked the same seven questions in the same order in the following two tests that he administered so not to create confusion. He explained that the Respondent had a strong reaction to the \$10 question in the first test. He then compared that result to the cocaine question in the three tests. To understand the polygraph chart (RX B), Kelly said he wrote a roman numeral I to indicate the first test. That was followed by the numbers listed 1-7 to indicate each question asked. If the Respondent replied with a yes to a question, a plus would be placed next to that question number. If he replied with a no, a minus sign would be used.

Kelly testified that immediately above the numbers on the chart were a series of graphs. The graph that looked like jagged lines was a measurement of the Respondent's heart rate. The single line that looked like a mountain range was a measurement of

perspiration or the speed of electricity. The single line on top of that that goes up and down measures breathing. In evaluating the chart results, Kelly went to question three the \$10.00 question. He explained that the bottom graph that measures the blood pressure "just shoots up" and that is a stress reaction. He looked at question number five. He said that result went up less than the \$10 question in both the breathing perspiration. In his opinion, that question was less stressful to the Respondent than the \$10 question.

Kelly then analyzed Question No. 7. which was, "Have you ever used any illegal drugs while you were a police officer?" Kelly said the polygraph chart showed a blood pressure drop and then a bit of an increase, but nothing in comparison to the result in question No. 3. He looked at the breathing result for that question. He said there was no breathing reaction whatsoever. Kelly testified that the results in the subsequent two tests were essentially the same as the first test. He stated that in his opinion, when the Respondent answered, "No" to Question No. 5, [ " Have you ever used cocaine while you were a police officer?" ] and Question No. 7, [ "Have you ever used any illegal drugs while you were a police officer?" ] the Respondent was being truthful in his answers. In his professional opinion, he stated that the Respondent was telling the truth that he never used any illegal drugs while a police officer.

During cross-examination, Kelly estimated that there were five to ten seconds between each question during the test and the first test lasted a few minutes. He acknowledged that he only asked the seven questions during the test. Of the seven questions asked, only two were relevant questions and a third question was the \$10.00 known lie question. When questioned as to why he did not ask multiple questions, Kelly responded, "I don't think it's necessary to ask. I don't know what else I could have asked

to tell you the truth.” When asked whether he gave any consideration to the fact the Respondent was a sergeant at the time of the test, not a police officer, Kelly responded that the Respondent was still a police officer whether he was a commissioner, inspector or a captain. Kelly stated that there was no way to tell if there was any hesitation in answering the questions from looking at the graph.

Kelly was asked whether he inquired from the Respondent during the pre-test questioning whether he used drugs before taking the test. Kelly responded that he only asked him whether he took any medication before taking the test. Kelly acknowledged that polygraph testing is not an exact science. He admitted that each of the three examinations he administered lasted no longer than two to three minutes. Kelly testified that he was not aware of any substances that one could consume to affect the test result. He explained that he previously tested two individuals who admitted to taking Valium before the polygraph test. He stated that their test results were the same reactions as anyone else. He further explained that if anyone taking the test had a lowered response to questions, he could enhance the results by turning up his knobs on the testing equipment.

Kelly was asked whether the answers to the questions he posed in the three tests were consistent with each other. He stated essentially yes, but added that in the second test, Question No. 5 [“Have you ever used cocaine while you were a police officer?”] yielded a higher perspiration reaction than in the control question, Kelly discounted this result and called it an “aberration” since the Respondent had no reaction the other two times the question was asked.

During redirect examination, Kelly stated that he was not sure whether he had a discussion with the Respondent about his own belief that the term, “police officer”

referred to the Respondent's entire time being a member of the New York City Police Department. Kelly stated that if the Respondent answered the questions in the negative in such a way that he did not use cocaine as a police officer but did use it as a sergeant, some levels of stress would have been reflected in the testing.

During questioning by the Court, Kelly stated that one could not delay answering a question as opposed to giving a quick answer and impact the body's reaction. He explained that even if the person did not give a verbal answer to a question, the body would still react to the question. Kelly said that all of the questions he asks in a polygraph test require a yes or no answer.

### FINDINGS AND ANALYSIS

Prior to the commencement of this trial, the Respondent filed a Motion to Dismiss this cause of action. The Decision in the Motion to Preclude Evidence is attached as Schedule A. At the commencement of the trial, the Respondent renewed his application to dismiss this cause of action. A synopsis of the motion and the Court's ruling at trial are summarized below:

### MOTION TO DISMISS

At the commencement of trial on April 9, 2008 the Respondent noted that this proceeding was based on the allegation that the Respondent had consumed an illegal substance, specifically cocaine, and the evidence would be based on a hair sample taken from him pursuant to Department policy in place in August 2006. The Respondent stated that the Department policy had been changed from random urine testing to random hair

testing. The change in procedure had been challenged by the Sergeant's Benevolent Association and the other four unions that represent uniformed members of the Department. The Board of Collective Bargaining ("BCB"), the administrative agency which oversaw the issues raised ruled in favor of the unions. It found that the City's imposition of the random hair testing was illegal and violated provisions of Labor Law. The Respondent had previously filed a motion with the Deputy Commissioner of Trials to preclude the Department from using the hair sample since the BCB found the hair testing procedure to be illegal. The Deputy Commissioner of Trials then submitted a Decision (See Schedule A) denying said application. The Respondent then renewed its application at the commencement of this trial based on legal developments. The Respondent explained that Manhattan Supreme Court Judge Lonnie Wilkins reversed the decision of the BCB which had the effect of annulling and staying the Department's ability to implement random hair testing. The Respondent's attorney recollected that the unions appealed Judge Wilkins' Decision to the First Department. The First Department issued a Preliminary Order enjoining the City from implementing the random hair testing. The Respondent argued that this was an indication that the First Department would likely find the Department violated provisions of Labor Law. Therefore, the Respondent renewed its application to preclude the use of the Respondent's hair sample in this proceeding.

The Assistant Department Advocate stated that since the First Department only issued a preliminary injunction, there has not been a final determination on the issues raised by the Respondent. The Assistant Department Advocate also said that since the Deputy Commissioner of Trials had already decided that the Police Department can go

forward with the case against the Respondent, there was no preclusion from using the results of the Respondent's hair test in this proceeding.

This Court rendered its decision from the bench on April 9, 2008. The Court found that the BCB determined that the Department's hair test policy was not illegal but an improper practice. Whether the Department's hair testing policy was legal or illegal, constitutional or unconstitutional had not yet been determined by any Court. Therefore this Court upheld the decision of the Deputy Commissioner of Trials denying the motion to dismiss this cause of action and in turn allowing the Department to proceed in a disciplinary trial utilizing the results of the Respondent's hair test. This Court also denied the application to renew the motion to dismiss this matter while preserving the Respondent's objection to said decision for the record.

#### Specification Nos. 1 and 2

The Respondent stands charged with ingesting and possessing cocaine. One question that must be answered: Did the Department present substantial evidence sufficient to prove that the Respondent ingested and possessed cocaine? I find that the question must be answered in the affirmative. As a result, I find the Respondent Guilty as charged.

With regard to the procurement of the Respondent's hair samples, Davis testified that she, as a police officer and certified Emergency Medical Technician, followed proper procedure when she cleaned the examination table with alcohol to prevent cross contamination prior to spreading the butcher block paper and before shaving the Respondent's chest hair. She testified that she used gloves prior to shaving the chest hair.

She also stated that she used a new, disposable razor to shave the Respondent's hair. Davis said that she followed proper procedure in collecting a sufficient amount of chest hair to fill each of three tinfoil strips, that she placed the hair samples into three sealed envelopes each of which contained a drug screening number unique to the Respondent. The samples were then stored in a secure hair locker, two of which were arranged for sealed delivery to Psychomedics and the third sample remained at the Medical Division under the supervision of the sick desk supervisor for delivery to the Respondent in the event that he sought to have the third sample tested by a laboratory of his choice. As to the testing itself, in the first Departmental trial in which hair testing evidence was introduced to prove the ingestion of controlled substances, Disciplinary Case No. 70729/96, the Hearing Officer found that radioimmunoassay (RIA) confirmed by Mass Spectrometry (MS) is a reliable method of detecting the presence of cocaine in hair.

It is also settled that due process does not require that the technician(s) who performed the scientific tests be called to testify; it is sufficient for the laboratory director, in this case Cairns, to confirm that Psychomedics followed proper laboratory procedures, that a proper chain of custody regarding the samples was maintained, and to testify regarding the analytical procedures utilized and the results obtained as delineated in the laboratory litigation support package (DX 7). Gordon v. Brown, 84 N.Y.2d 574 (1994), See also People v. Rawlins, 10 N.Y.3d 136 (2008). These results clearly show that the Respondent's hair samples contained cocaine and Cairns' expert testimony sufficiently established that the combined RIA and MS results, with levels above the



cutoff rate of five shows that the cocaine detected could only be the result of the Respondent having ingested cocaine.

Evidence adduced at trial established that the hair samples collected of the Respondent, which was placed in envelopes, sealed and initialed by the Respondent were the same samples tested by Psychemedics. Testimony presented by the Department was that the chain of custody was not broken.

Cairns testified credibly that the sample tested by Psychemedics under the Department Identification No. 18-2590-06-XH was, in fact, the Respondent because the same drug screening number used in the packaging of the Respondent's hair sample was initialed by the Respondent (See DX 7 the Laboratory Data Package, page 7). It must be noted that two, separate hair samples collected from the Respondent were separately tested on different dates utilizing both the RIA test and the second test MS, and both samples came back positive for cocaine well above the cutoff level of 5 ng. In addition, both hair samples tested positive for the metabolite BE, which can only be produced after cocaine was present in the bloodstream. Furthermore, Cairns testified that the samples are checked for tampering prior to conducting any laboratory tests and the seals were intact.

Cairns dispelled the notion that the Respondent could have tested positive due to external contamination. Cairns explained that since the Respondent's chest hair was used for testing and that chest hair is covered by clothing, it is unlikely that the chest hair would be exposed to external contaminants resulting in a positive cocaine result. He opined that the cocaine the Respondent ingested self-contaminated his chest hair when it exited his body through his sweat. Cairns testified credibly that the RIA cutoff for a

positive cocaine test result is 5 nanograms per 10 milligrams of hair. The same cutoff applies to the MS confirmatory test. He explained that these cutoff levels are accepted by the federal government, the Food and Drug Administrations, various state agencies as well as the Police Department. He further explained that if cocaine is ingested in the body, one would expect to see the metabolite BE present in the same sample and at a concentration level at 5 percent or greater of the cocaine concentration. This would verify that the cocaine had been ingested.

Cairns testified that in the Respondent's case, with respect to the first hair sample, cocaine was present at a concentration level of 22 nanograms per 10 milligrams of hair where the cutoff level was 5. BE was present at a level of 1.3 nanograms per 10 milligrams of hair, which is in excess of 5 percent and which qualified for a positive test result. Cairns said that the second hair sample would not be tested until a determination was made that the first hair sample was positive. Such was the result in the Respondent's case. Cairns stated that the Respondent's second hair sample had a cocaine concentration level of 23.9 ng/10 mg of hair. BE was present at a level of 1.5 ng/10 mg which was more than five percent and also qualified for a positive test result. (See DX 7 pp. 4-5). Cairns said that hair collection had a look back period of six months from the date of collection which meant that cocaine consumption could have occurred anytime between February 21, 2006 and August 21, 2006, the date of collection. Cairns stated that in his expert opinion, the Psychomedics test results indicated multiple ingestions by the donor, who in this case was the Respondent.

Cairns went on to testify that he had an opportunity to review the test result of the Respondent's third hair sample that the Respondent sent to Quest Laboratory for testing.

He stated that the result of that test was that the Respondent had cocaine at a level of 17.7 ng per 10 mg of hair and that BE was present in excess of 5 percent. He said this third result confirmed the results of the Psychemedics two tests. He explained that a different laboratory was used, which employed different testing methods using different people yet the results were the same and confirmed that the Respondent was a cocaine user who had multiple ingestions of cocaine. He further explained that multiple ingestions of cocaine represented three or four lines of cocaine being consumed in a 90-day period just to reach the cutoff level of 5. If the cocaine potency was high, less cocaine would be consumed; and if it were less potent, more lines of cocaine would have to be consumed. Cairns said that this usage could still be considered recreational use or weekend use and that the user would not necessarily display outward signs of drug use.

The Respondent made inquiries into whether Psychemedics in the five million samples that the company had tested to date ever had a false positive result. Cairns stated unequivocally, "No." He said that Psychemedics aggressive washing procedure prevents that result. He explained that the first sample is not subject to the washing procedure, but the second sample is. He stated that the washing procedure has the effect of removing environmental contamination or decontamination so that the amount of cocaine that is tested is the amount of cocaine that was trapped in the hair via ingestion through the bloodstream. Cairns then referred to a Florida study of undercover detectives who were exposed to drugs eight hours a day. They were subjected to the Psychemedics washing procedure and after 90 days, none of the detectives tested positive for drugs. Cairns explained that this was a severe case of contamination because the detectives handled drugs regularly, yet none tested positive for drugs.

Cairns explained that there was a five-step washing procedure utilized in the Respondent's case (See DX 7 p. 13). The hair is washed for 15 minutes using isopropyl alcohol. The isopropyl wash is removed and a first wash buffer is used which maintains a slightly acidic pH level. The first wash buffer water is removed and a second wash buffer is used. The process continues until the fourth wash buffer is completed and removed and a fifth wash buffer is utilized. The five wash buffers lasts for three and one half hours. Cairns stated that the isopropyl alcohol is added to the wash to remove any cosmetic preparations added to the hair such as gels, mousse, or hair spray. Cairns said that the fifth wash is retained and analyzed and in this case, the result was .6 for the presence of cocaine. Cairns explained that when someone tests above the cutoff level at a 22 or 23 as the Respondent did; one would expect to find trace levels of cocaine in the final wash.

Cairns testified that the hair analysis does not end at the fifth wash. He explained that the fifth wash is a one-hour wash. The result of .6 is then multiplied by a concentration of 5 as if the Respondent's hair had been washed for five more hours. Since the concentration levels get lower and lower, with each additional wash, the result would be a 3. The 3 is then removed from the ingested portion of the cocaine result as a conservative step and if the sample is still above the cutoff level, the sample is reported as a positive. If the 3 that was subtracted from the Respondent's result made the sample below the cutoff level, the result would have been reported to the Police Department as a negative. Cairns concluded that the combination of the five-step aggressive washing procedure and the conservative multiplication of the fifth wash result is how the company addresses external contamination of a sample.

When questioned as to how the Respondent could have cocaine trapped externally on his chest hair, Cairns explained that when someone ingests cocaine, it enters the blood stream and feeds the hair follicles. The blood also feeds the sweat glands and would deposit on head hair. The blood would also feed the sweat glands and deposit on chest hair also. Cairns was also questioned as to whether the fact that the Respondent was African-American would effect the test results arguing that cocaine binds to African-American hair more readily. Cairns responded that there is no hair color bias in hair testing by Psychemedics. He explained that in 2007, there was a forensic crime communications study performed by a Canadian named Professor Koren. He had 40,000 samples and contaminated the hair using 8,000 lines of crack cocaine smoke. The study utilized the Psychemedics procedure which first dissolved the hair separating the melanin color component. The study found that there was no bias in the Psychemedics procedure. Cairns explained that when a hair sample is tested by Psychemedics, it is colorless and has no color component because it is dissolved, centrifuged and separated out from the tested hair sample.

Cairns further determined that in all the hairs samples he tested, he never found an externally contaminated sample to test at or above the cutoff level of five. He also explained that it did not make a difference whether cocaine was snorted, smoked or eaten because the positive test result would be the same. The different ways to consume cocaine only affected the intensity of the high the user felt. That is, smoking created a more intense high than snorting cocaine. Eating the cocaine in food, for example, is the least intense because the stomach's digestive process, dilutes the effect of the cocaine by

50 percent requiring a very large consumption of food laced with cocaine to test at or above the cutoff level of five. I found the testimony of Cairns to be compelling.

The Respondent denied that he ingested cocaine and offered no explanation at trial or during his Official Department Interview as to why his hair samples may have tested positive for cocaine. There was no evidence proffered at this proceeding that the laboratory made a mistake or that the chain of custody with respect to the hair samples had been broken. The Respondent did present a polygraph expert, William Kelly, who performed three polygraph tests on him consecutively on October 16, 2006. They spent time acquainting themselves with each other prior to the test, and Kelly testified that he reviewed the series of questions that he would be asking the Respondent prior to the test. Kelly testified: "I went over the questions that I was going to ask him during the polygraph, one being, 'Have you ever used cocaine while you were a police officer?'" Kelly also asked the Respondent: "Would you have a problem if I asked you have you ever used any illegal drug while you were a police officer?"

Kelly went on to testify that he asked the Respondent seven questions in the same order in all three tests. The two relevant questions were stated above and the other five questions were irrelevant to the test such as the Respondent's name and whether he was married. Kelly said the polygraph test he administered is a relevant/irrelevant test. There were several areas of concern to this Court in the testing procedure. During cross-examination, Kelly acknowledged that each test lasted no more than two to three minutes. There was no way to measure with certainty how long it took the Respondent to answer each question. Another concern was that only two relevant questions were posed to the Respondent; and those two questions asked whether he used cocaine or illegal drugs as a

police officer and the Respondent is a sergeant. Although Kelly tried to argue that a sergeant is still a police officer, the fact that the Respondent was aware of the questions ahead of time and knew that he had not been in the rank of police officer for a number of years, gave an outlet to answer the question in the negative without accountability. The fact that in Kelly's opinion the Respondent did not lie during the test is clouded by the fact that the questions were so few and not tailored specific enough for the Respondent to answer truthfully as to his current position with the Department. Also, in preparation for the test, Kelly said he asked the Respondent if he consumed medication, but he failed to ask him if he consumed illegal drugs.

Furthermore, when questioned under cross-examination as to why he did not ask the Respondent multiple questions, Kelly responded, "I don't know what else I could have asked to tell the truth." The Court is under the belief that there were a myriad of questions that Kelly could have asked the Respondent related to drug use other than the two ill-framed questions asked in the polygraph test.

In addition, Kelly testified that he asked a question that every one lies to, namely: "Have you ever stolen anything worth more than \$10?" and the Respondent answered "No." It was Question No. 3 and the measurement on the perspiration or electricity scale which is the line that looks like a mountain range is at its peak. (See page 1 of RX B). This result does not appear much different than the result in Question No. 5 on page 1 when the Respondent was asked, "Have you ever used cocaine while you were a police officer?" and the answer on the polygraph sheet appears to be the peak of a mountain range also. Even Kelly admitted during cross-examination that the Respondent's reaction to Question No. 5 in the second test had a higher perspiration reaction than the result in

the \$10.00 control question. Kelly discounted this result as being an aberration from the results in the rest of the test. Given the fact that each of the three tests lasted no more than two to three minutes, there was not enough depth in the examination to discount anything. Moreover, Kelly testified himself that if the Respondent used the reference to police officer in the two questions to answer in the negative knowing he was a sergeant at the time that some level of stress would be reflected in the testing. It is the opinion of the Court that the result in Question No. 5 reflected some stress.

Nevertheless, for many reasons this Court found the results of the polygraph test and the questions posed not relevant or specific enough to truly obtain a clear response. Therefore I did not find the alleged polygraph results, as testified to by Kelly, to be persuasive.

Accordingly, I find the Respondent Guilty of Specification Nos. 1 and 2.

#### PENALTY

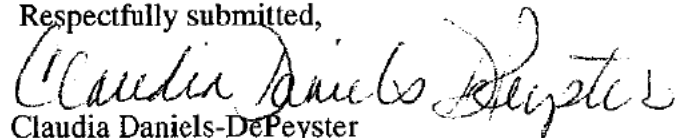
In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Police Department on January 20, 1987. Information from his personnel record that was considered in making this penalty recommendation is contained in the attached confidential memorandum. The Respondent has been found Guilty of wrongfully ingesting and possessing cocaine. This is based on the testimony of Davis providing the chain of custody with respect to the collection of the Respondent's hair sample and forwarding for testing; and the expert testimony of Cairns which concluded that the two positive hair tests (levels of 22 ng cocaine /10 mg hair and 23.9ng cocaine /10mg of hair) using MS with the corresponding positives for the metabolite BE,



both well above the cutoff level of 5ng came from the Respondent deliberately ingesting cocaine on multiple occasions.

Based on a preponderance of the credible evidence presented at trial, it was established that the Respondent violated the Police Department's absolute prohibition regarding using illegal drugs, and, as a result, I recommend that he be DISMISSED from his employment with the New York City Police Department.

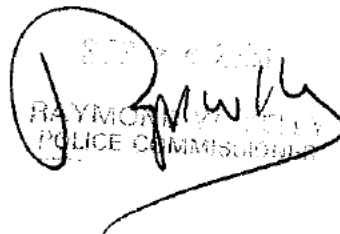
Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner - Trials

APPROVED



SEP 14 2011  
RAYMOND V. KELLY  
POLICE COMMISSIONER